

Summary Report to the 61st Session of the Montana Legislature Regarding Senate Joint Resolution 7

During the 60th Session of the Montana Legislature, Senators Greg Lind and Trudi Schmidt successfully legislated a joint resolution (SJ 7) of the Senate and the House of Representatives directing the Department of Public Health and Human Services (DPHHS), (Department) and the Department of Justice (DOJ) to examine the issue of requiring background checks for direct-care workers and to provide a proposal to the 61st Legislature. In the resolution, a proposal is to be developed and presented to the 2009 Legislature "that would require an applicant seeking employment as a direct-care staff person in a program or service that is provided, funded, or regulated by the DPHHS to undergo a criminal background check, using fingerprints, through the Federal Bureau of Investigation as a condition of employment."

This document serves as a summary regarding the work performed by DPHHS, DOJ, and interested members of the public on SJ 7 and concentrates on using fingerprints as a condition of employment as requested in SJ 7.

It is important to note however that other methods for criminal background checks exist and those were discussed as options by the workgroup. However, the result of the workgroup's study focused on a proposal for a requirement for a fingerprint based criminal background check on all individuals who work in designated health care settings. This proposal reflects the directive of SJ 7 and also ties into the mission of DPHHS which is: "To improve and protect the health, well-being, and self-reliance of all Montanans."

The workgroup's proposal and rationale for the proposal is summarized below with additional information included in this report and its attachments to the 61st Session of the Montana Legislature.

The proposal is comprised of these necessary components:

1. Fingerprint checks for new hires
2. Registry of direct-care worker applicants
3. Disqualifying events list
4. Appeals process

PROPOSAL

1. **Fingerprint checks for new hires.** A condition for new hire direct-care workers in specified settings is a fingerprint based background check. Direct-care workers that are already employed will be exempt (grandfathered) from the fingerprint background check requirement until such time as they change employers. At that time, the required fingerprint background check will be

required. The effective date of this requirement is suggested to be July 1, 2010. The proposal includes utilization of two fingerprint based background checks conducted by the Department of Justice; a FBI based fingerprint check, and a Western Identification Network (WIN) state fingerprint check (WIN - Montana, Alaska, Idaho, Nevada, Oregon, Utah, Washington, and Wyoming).

2. **Registry of direct-care worker applicants.** A secure registry of all direct-care worker applicants that have undergone a fingerprint background check will be developed and maintained by DPHHS. Employers will be able to access the secured registry to determine if an applicant has had a fingerprint background check completed within a specified time period that has yet to be determined. DPHHS and DOJ would jointly enter into a Memorandum of Understanding (MOU) that will address and allow an exchange of information to provide information for purposes of the registry.
3. **Disqualifying events list.** A list of disqualifying events will be determined and is proposed to be established in both statute and administrative rule. If an individual has a felony conviction of a listed disqualifying event, employment will not be allowed or may not be allowed under law for a determined period of time in designated service settings.
4. **Appeals process.** An appeals process is proposed that will allow applicants to dispute the veracity of the fingerprint background check as well as whether or not the applicant has been rehabilitated to the point of regaining the public's trust.
5. **Estimated Cost.** The estimated cost of this proposal in the first year of operations is \$1.4 million, which consists of the cost to conduct the fingerprint based criminal background check (\$976 thousand), and the combined administrative costs of DPHHS and DOJ (\$431 thousand). The estimated costs are based upon the proposed components as mentioned above and the current cost for fingerprint based background checks. A key component to the cost analysis is the availability and allowance by the Federal government of Medicaid matching funds for both the cost of the background check and the States' administrative costs of the program.

RATIONALE

Fingerprint checks for new hires. Due to the increasing societal problems with identity theft, other options for criminal background checks that utilize name-based searches were considered inadequate. Name-based searches look for criminal history records that match a person's name and numeric identifier, such as date of birth and/or Social Security number. Name-based searches have two inherent weaknesses: false-positives - a record is returned on a person with the same name and numeric identifier provided in the request but who is not the subject of the inquiry, and false-negatives - no match is erroneously returned because the name or

numeric identifier in the record does not match the name or numeric identifier used in the inquiry.

Fingerprint based background checks provide a positive biometric identification of the person regardless of the name or numerical identifiers utilized.

Montana is one of the few remaining states that does not have a comprehensive public policy regarding background checks for direct-care workers in the health fields. The other states comprise some of our neighboring states including North Dakota, South Dakota, and Wyoming. Other states without a requirement include Alabama, Colorado, and Connecticut. All of the other states have a requirement under state law or other regulations for criminal background checks, with eight states (19%) utilizing fingerprint only for some worker classifications.

This proposal follows the directive of SJ 7 to prepare a study report utilizing fingerprints. The resolution identified a fingerprint process through the Federal Bureau of Investigation (FBI), but the study results identified another alternative resource that is equally effective. That resource is a fingerprint check process through the Western Identification Network (WIN). WIN is a consortium of state and local law enforcement agencies that have implemented a shared network and Automated Fingerprint Identification System (AFIS) processing service to provide the ability to search the criminal fingerprint records of the member agencies. WIN member agencies include Alaska, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming. Therefore, if an applicant demonstrates residency within one of these states the fingerprint check can be limited to the WIN states. If the applicant has lived in states other than those in WIN, an FBI fingerprint background check will be required. The proposal to implement this public policy recommends that existing employees be grandfathered and fingerprint checks would not be required until the employee resigns and seeks employment with a new employer. The workforce turnover rate for existing employees is fairly high depending on the occupation. Therefore, it is anticipated that all existing employees would have completed a fingerprint based background check within three to five years. Allowing grandfathering relieves unnecessary burden on employees, employers, and staff involved in processing the fingerprints.

Registry of direct-care worker applicants. This proposal includes the creation of a secure registry of applicants who have undergone fingerprint background checks. This registry is a critical piece of this proposed program as a source of information to identify individuals that have completed a fingerprint background check. This registry is planned to be a resource for employers to verify if a criminal background check was already completed on a prospective employee. The registry will provide secure access for employers to maintain the integrity and security of the database. An employer will be able to check this registry, and if a prospective employee or applicant has had a criminal background check done, another fingerprint check will not be required. The workgroup believes the establishment of a registry is a key factor to keep the costs of the program under control. Without a registry, the

providers in the identified services settings will be required to conduct significant numbers of fingerprint background checks at significant costs.

Employees and applicants who have passed the background check will not have to be rechecked. The registry eventually will also provide a resource for employers to readily identify applicants that have disqualifying events. DPHHS and DOJ will administer a data sharing agreement for the registry under a proposed Memorandum of Understanding (MOU). Processing of background checks will be communicated directly between employers and DOJ thereby limiting DPHHS interaction in the process. This will decrease the timeframes between the fingerprinting and employer notification.

Disqualifying events list. The proposed list of disqualifying events will contain the relevant crimes that would put vulnerable populations at risk of harm by direct-care workers. The crimes would be identified as felony convictions and classified as either permanent or aged out offenses. Permanent disqualifying events would be listed in statute while aged out offenses would be identified in administrative rule. This would allow for protection of the vulnerable populations while allowing flexibility for employers. Both permanent and aged out events will be determined through public participation processes.

Appeals process. The appeals process is designed to provide the applicant and the prospective employer two options for appeal while considering the interests of vulnerable populations in Montana. The appeals process would allow an applicant to dispute the facts of the fingerprint background check or demonstrate appropriate rehabilitation to warrant the public's trust. This appeals process is a combination of the processes used by other states but which appears to meet the needs of applicants, employers, and the people served.

This proposal and rationale are based on the findings of the workgroup as further detailed in this comprehensive report to the legislature. This report provides information regarding the work products of the workgroup including charts, reference material, meeting minutes, and group member information. Legislation would be required to enact a background check requirement and implement it as new public policy for the State of Montana. If enacted, Montana will join several neighboring states in establishing a program to help protect the health and safety of vulnerable individuals residing in alternative health care settings or receiving services in their home.

This proposed policy is intended to establish a requirement for a certain type of background check as the minimum and is not intended to prevent an employer from utilizing other resources that are available to screen or check on the background of an employee. The intent is to identify certain felony convictions that are considered significant that would disqualify employment in certain health care settings. This policy would not mean that the individual cannot be employed in Montana based upon their

criminal history, but that they cannot be employed in certain settings involving vulnerable Montanans.

The cost of this proposal is significant in the first two years of operation to accommodate the health care workforce and turnover in that workforce. The cost of a fingerprint criminal background check is estimated to be approximately \$1.4 million in the first full year of operation and then reduced to approximately \$939 thousand in the second year. The costs are expected to reduce in year three and year four to approximately \$745 thousand and \$730 thousand respectively, and remain at that level or lower annually thereafter. This estimated cost includes both the cost of the fingerprint background check and the administrative costs of DPHHS and DOJ. Associated start up costs prior to the first years of operation is estimated to be approximately \$336 thousand.

Current Practice

Licensed health care providers are required to show evidence through policies and procedures that they have some type of process in place to protect resident, client, and patient safety. The employer is held to what is in the policies and procedures, and thus, in some cases, the assurance to the public may be minimal.

Some health care facilities currently perform background checks including but not limited to criminal history, driving records, and credit checks. Employers have various resources available to them. Some use the DOJ resources for name based and fingerprint checks, while others rely on the services of private background check companies. Costs for these services vary from \$10 to \$100 depending on the type and source.

To get an idea of the scope to which providers conduct criminal background checks, DPHHS conducted a survey of providers in March and April 2008. There were approximately 250 responses. Of those that responded, 87% indicated that they perform some form of criminal background checks on applicants before employment. Over 59% of the respondents utilize a name-based check via the resources provided by DOJ, followed by 43.5% who do reference checks, and 34.7% who use a private background check service. Only 3.7% of respondents complete fingerprint background checks.

The results were almost evenly divided between employers that hire the applicant on a probationary basis, pending the results of a background check (51.4%) and those who delay hiring the applicant until a background check has been completed (48.6%).

The Options

While the workgroup agreed that fingerprint criminal background checks were the best method to positively identify an individual, several options were discussed and debated before consensus was reached. Those options included a fingerprint based background check, a requirement for a criminal background check with a State prescribed process, and finally a general requirement for a criminal background check as defined by an employer's policies and procedures. Details of those options are found at Attachment G. Lastly, in the

absence of legislation or a state requirement, Montana would do nothing different from what is currently done by providers now.

The reasons the workgroup determined that a full fingerprint background check was the best option were:

- Fingerprint checks extend beyond current requirements for licensing requirements
- Fingerprints are the most accurate means to identify an individual
- Fingerprint checks alert employer to inaccurate information provided such as misspelled names and inaccurate social security numbers
- Fingerprint checks include aliases and charges pending
- Fingerprint checks do not preclude the employer from performing an additional type of background check (credit, driving records, etc.)
- Fingerprint checks are the only method available to obtain a national check

To reach this proposal and address the requirements of SJ 7 the workgroup considered and discussed every provision contained in the resolution. A summary of those provisions are outlined below with a brief discussion of the decision making process.

Resolution Points Addressed: (each number refers to the specific provision in the resolution)

(1) Identify the programs and services for which criminal background checks should be required;

The workgroup spent several hours in several meetings discussing this issue. The Department funds or regulates almost 300 programs and services. While the workgroup was cognizant of the reasons for including almost all of the programs and services, the workgroup did not want to include so many as to make this undertaking unmanageable at its conception. The workgroup considers the proposed list of programs and services a first step in ensuring the safety of all Montana citizens who receive any services funded or regulated by DPHHS. A complete list of the service settings is outlined in Attachment B.

(2) Specify the direct-care staff positions for which criminal background checks should be required;

While the workgroup was cognizant of the reasons for including almost all health care workers who have any access to patients, residents, and clients, the workgroup did not want to specify and define each position by name or title. The workgroup felt that each employer may have different names or titles for similar positions. To include names or titles for employers would have made this project costly and difficult to implement in a timely fashion. The workgroup considers the proposed definition of workers a first step in ensuring the safety of all vulnerable Montana citizens who receive any services funded or regulated by DPHHS. Based upon a collaborative process the workgroup achieved consensus on the following definitions:

"Direct-care access employee" means a person, 18 years of age and older, who has employment or contractual relationship with a service setting that is funded or regulated by the Department and involves direct contact with a vulnerable person. Such term does not include an individual that is employed or providing services through a private arrangement with a vulnerable person or their designated representative.

"Vulnerable person" means a person who receives services as defined in this "Act" and who needs to be protected from abuse, neglect, or exploitation.

"Direct contact" means physical access to persons receiving services or that person's personal property.

"Service setting" for the purposes of this "Act" means those programs or services that the legislature has determined to represent the greatest risk to the health, safety, and welfare of vulnerable persons served by the Department. These services are defined in statute and administrative rule and found in Attachment B.

The workgroup could not come to consensus on the volunteer category of workers. Many volunteers perform work that might otherwise be a paid service. Many volunteers also spend considerable periods of time alone with this vulnerable population. The workgroup heard from a variety of employers, organizations, and associations that requiring background checks for volunteers would seriously limit their ability to secure this necessary worker category, and thus increase their cost for paid staff or limit the amount of service they could provide to a community. The category is not in this proposal, but the workgroup respectfully requests that the legislature considers the pros and cons (Attachment J) of the issue and decide accordingly.

(3) Provide a detailed process and timeline for collecting an applicant's fingerprints, submitting them to the Federal Bureau of Investigation, and distributing appropriate information to employers;

The workgroup reviewed all types of background checks because cost, reliability, and thoroughness are all factors driving this proposal. This proposal focuses on the directive of SJ 7 to prepare a study report utilizing fingerprints. The resolution identified a fingerprint process through the Federal Bureau of Investigation, but the study results identified another alternative resource that is equally effective. That resource is a fingerprint check process through the Western Identification Network (WIN). WIN is a consortium of state and local law enforcement agencies that have implemented a shared network and Automated Fingerprint Identification System (AFIS) processing service to provide the ability to search the criminal fingerprint records of the member agencies. WIN member agencies include Alaska, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming.

A national FBI background check can be completed for \$29.25 plus the cost of obtaining the fingerprints, and a WIN background check can be completed for \$10.00 plus the cost of obtaining the fingerprints. The cost of obtaining fingerprints can vary from \$5.00 to \$40.00 depending on where the fingerprints are taken. For the purposes of this study

and the cost analysis under provision (6), we used an estimated cost of \$20.75 for obtaining fingerprints, resulting in an estimated cost of \$50.00 for an FBI check and \$30.75 for a WIN check.

Fingerprint checks are considered the most thorough and accurate since it identifies an individual by fingerprints, instead of name or any other identifiers. Therefore, if an applicant demonstrates residency within one of WIN states the fingerprint check will be limited to the WIN states. If the applicant has lived in a state other than those in WIN, an FBI fingerprint background check will be required. The DOJ can accomplish these checks within 7 to 10 days and believes that they would be able to handle an increased workload by hiring more staff. The process would utilize enhanced resources and capabilities of DOJ with proper training of providers and instructions for the program. A proposed process is outlined in Attachment C.

(4) Establish a specific list of relevant crimes that would exclude a convicted applicant from employment as a direct-care staff person;

The workgroup gathered information from 10 states regarding disqualifying events which prohibit working within the designated programs or services within the respective states. Comparisons were made among 10 states, and then the group carefully considered the needs of Montana as they developed the proposed final list. See Attachment D.

(5) Establish an appeals process for applicants who are denied employment because of the results of a background check; and

The workgroup was hesitant to outline an elaborate appeals process noting that anything more than appealing the veracity of the record itself would add significant cost to the process. Members noted that a disqualifying event does not preclude an individual from working. The individual with the criminal background would only be prevented from working in one of these designated service areas. Some workgroup members disagreed on this point and wanted a process whereby anyone could appeal any disqualifier. Therefore, a two step appeals process was identified.

The workgroup determined that if an individual disputed the facts of a background check, the appeal would be made to DOJ. This is a service that DOJ currently provides for individuals that dispute the results of the information on the background check report. This would pertain to individuals who dispute the fact that the information on the fingerprint check pertains to their criminal history.

The second part of the proposed appeals process pertains to an applicant who agrees that the fingerprint check is correct, but believes that the applicant has been sufficiently rehabilitated to warrant the public's trust, or that the crime was the result of extenuating circumstances that can justify a reconsideration of the ability to work in these settings. At that point, an appeal would be made to DPHHS.

A proposed appeals process is contained in Attachment E. If enacted, the Department anticipates the need to convene an advisory council or workgroup to promulgate specific

administrative rules regarding an appeals process. The process would include an administrative review of the file, including items for example as the Final Order and Judgment, a report from the probation officer, personal and professional references, etc. If the decision of this appeal was negative, the applicant could appeal to a formal review or Fair Hearings Process. A detailed account of the entire appeals process can be found at Attachment E.

(6) Determine the estimated cost and sources of funding for implementing the system of criminal background checks outlined in the proposal.

The workgroup discussed the financial impact that any change in current practice might have on employers. The workgroup believed that the cost of a fingerprint based background check cannot be born entirely by the employer (providers). However, the workgroup also recognized that providers are currently incurring some costs to perform background checks on employees, and that amount is approximately \$10.00 - \$11.50 per check, to the extent that they are utilizing the services provided by DOJ for name-based background checks. Some providers are paying more if they utilize private entities to conduct this service.

The workgroup also discussed the cost impact on prospective employees. For some types of employees, the cost could be shouldered by the prospective employee because of the related status of the position and the rate of pay; for other types of positions, such as nurse aides, the cost might discourage individuals from entering the field.

For this reason, the workgroup suggested a type of shared cost of the fingerprint process but cautioned the Department from proposing a process that puts the entire burden upon the employer. After considerable discussion it was determined to be reasonable that providers share in the cost of this public policy, but exclude prospective employees from the cost sharing. Therefore, for the purposes of this cost analysis this cost sharing amount was determined to be \$11.50 per fingerprint check.

Depending on the type of fingerprint background check (FBI or WIN), as mentioned earlier, the incremental cost after considering the employer cost sharing is \$38.50 (\$50.00-\$11.50) for an FBI check and \$19.25 (\$30.75-\$11.50) for a WIN check. The cost analysis contained in this study recognizes this cost sharing assumption and the general consensus of the workgroup members for this proposal that employers would not bear the entire cost of the program.

The cost analysis also recognizes the direction by the workgroup to include a discussion on the possibility of obtaining federal Medicaid matching funds for the cost of the fingerprint checks as well as the administrative costs to conduct the fingerprint check process. Several of the workgroup members stressed the importance of this federal Medicaid funding to the success of this proposal.

Based upon the analysis outlined in Attachment F of this report, Medicaid funding is possible for the cost of the fingerprint background checks but, according to the Centers

for Medicare and Medicaid Services (CMS), the cost of the check must be incurred by the employer (provider). The costs would then be considered a cost of doing business and the provider could be reimbursed for these costs via the Medicaid rate setting methodology for the specific program or service, or an alternative reimbursement methodology could be developed that is based upon Medicaid utilization for the program or service. The key requirement according to CMS for federal Medicaid participation as a Medicaid benefit is that the provider would be responsible to pay the cost of the fingerprint background check. This requirement conflicts with the general consensus of the workgroup in their discussion to propose a fingerprint background check process.

As mentioned earlier the cost of this proposal is significant in the first two years of operation when background checks will be required. The cost of the fingerprint criminal background check is estimated to be approximately \$1.4 million in the first full year of operation and then reduced to approximately \$939 thousand in the second year. Administrative costs for DPHHS and DOJ are estimated to be \$431 thousand in the first full year of operation and \$440 thousand in the second year to cover program administration. Associated start up costs prior to the first years of operation is estimated to be approximately \$336 thousand.

Medicaid matching funds are a possible source of funding to offset some of this cost if the proposal includes a requirement for the provider to incur the cost of the background check. The amount of Medicaid funding that may be available under this scenario for the cost of the background check is estimated to be approximately \$261 thousand the first year and \$132 thousand the second year. In addition, in order to obtain Medicaid matching funds it would require a significant level of effort by the state Medicaid program to establish a reimbursement methodology and obtain CMS approval.

Therefore, how the costs will be paid and who will pay for the fingerprint background checks has not been determined. A detailed analysis of the costs and potential sources of funding is contained in Attachment F.

Conclusion

The SJ 7 workgroup has completed the tasks as outlined in the resolution and after careful consideration provides a proposal that meets the intent of the resolution to propose a program that requires fingerprint based criminal background checks. The authority that allows the State to implement a fingerprint based background check requirement for a noncriminal justice licensing or employment purpose is based upon federal law as contained in PL 92-544. This authority is identified in Attachment I from the DOJ, which outlines the authority provided under law to allow for FBI criminal record checks. The same law empowers the FBI to exchange identification records with officials or state and local governments for purposes of licensing and employment if authorized by a state statute which has been approved by the Attorney General of the United States.

Legislation would be necessary in order to implement a public policy for criminal background checks that allow criminal history information to be shared with providers. This

report does not include proposed legislation to implement this requirement but it provides information and processes that are important in developing a public policy for Montana.

Based upon the work and the discussion of the Senate Joint Resolution 7 workgroup, a general consensus was reached that now is the time for a public policy on background checks to protect the health and safety of vulnerable people served in Montana. How that public policy is established and the method for background checks is an issue that is best determined by the legislature. This report addresses the critical issues regarding criminal background checks, specifically those involving a fingerprint based check that should be considered in developing a public policy.

Acknowledgments

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